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No. 753

In the Supreme Court of the United States

OCTOBER TERM, 1957

BENJAMIN INDIVIGLIO and ROSE DIAZ, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The opinion of the Court of Appeals (R. 1321-1355; Pet. App. A, 31-65) is reported at 249 F. 2d 549.

JURISDICTION

The judgment of the Court of Appeals was entered October 31, 1957 (R. 1356). A petition for rehearing was denied on December 5, 1957 (R. 1391). Mr. Justice Whittaker, on December 23, 1957, granted an extension of time within which to file a petition for writ of certiorari to and including February 3, 1958. The petition was filed on January 29, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the motion to suppress evidence made by petitioner Rose Diaz was improperly denied for lack of standing.

2. Whether the evidence seized from the defendant Giordenello at the time of his arrest was improperly received in evidence against all petitioners.

3. Whether the failure to turn over to the defense a statement by a government witness constituted prejudicial error.

4. Whether the judge adequately instructed the jury as to evidence admitted only against particular conspirators.

STATEMENT

In the United States District Court for the Southern District of Texas, petitioners and others [1] were convicted of conspiracy to violate the laws relating to marihuana and narcotics from January 1, 1955 to June 3, 1956 (R. 4-14), (R. 1216-1217). Petitioner Indiviglio was sentenced to four years' imprisonment and a twenty-five dollar fine (R. 1251). Petitioner Diaz was sentenced to two years' imprisonment and a fine of twenty-five dollars (R. 1253). On appeal, the Court of Appeals affirmed, one judge dissenting.

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[1] A separate petition for a writ of certiorari has been filed in *Veto Giordenello* v. *United States*, No. 515 Misc., on behalf of another of the defendants at this trial. In the Memorandum for the United States filed February 28, 1958, in that case, we urged that consideration of that petition for certiorari be deferred pending decision on the merits of *Giordenello* v. *United States*, No. 549, certiorari granted, 355 U.S. 811.

The significant evidence may be summarized as follows:

1. In the spring of 1955, the defendant Veto Giordenello engaged in various transactions involving marihuana with the defendant Kolm and co-conspirators Adams and Hoge. In the latter part of December, 1955, Giordenello, in the presence of Kolm and defendant Peevey, told Adams that he had brought a quantity of heroin from Chicago, Illinois, and offered to sell some of it to Adams (R. 119-121). Giordenello told Adams that he obtained his supply from an Italian named "Benny" in New York City who had a common-law wife named "Rose" (R. 122-123, 198-199). On January 5, 1956, Rose Diaz received in New York and cashed a Western Union money order in the amount of $2,500, sent from Chicago. (R. 995, 997, 1001, 1003; Govt. Ex. 50). On January 12, 1956, Giordenello sent a $500 Western Union money order to "Mr. Benny", New York City. This money order was cashed by petitioner Indiviglio (R. 548-550, 554, 721-723, 731; Govt. Ex. 19).

On November 10, 1955, a telephone was installed at 728 Columbus Avenue, New York City; the subscriber was petitioner Diaz (R. 695). Records showed that between December 18, 1955 and January 12, 1956, three calls were made from that number to "Veto" (Govt. Ex. 37A, 37D, 37E) at an unlisted number for Veto Giordenello in Chicago (R. 854, Govt. Ex. 42A-C). Two collect calls from "Veto" in Chicago were accepted on December 31, 1955 and January 4, 1956 (Govt. Ex. 37B and 37C).

2. About January 26, 1956, Adams agreed to sell "paper", *i.e.*, glassine envelopes of heroin, to Speedy

Williams and Charles Leonard (R. 132, 134). Adams had two "papers" concealed in Peevey's apartment and when he came to get them there, he met Peevey and Kolm at the apartment. In a few minutes Giordenello joined them (R. 132-134). The group were not able to obtain the six to eight "papers" they desired at that time (R. 135), so Adams and Kolm delivered only the two packages of heroin that had been hidden with Peevey (R. 135-136, 765-767, 773-774, 802-B, 803; Govt. Ex. 5). At the same time, Adams agreed to deliver more heroin to Leonard the following day (R. 139, 769).

On or about January 22-23, 1956, Giordenello had asked a friend of his, co-conspirator Leland E. Smith, for permission to leave a package in Smith's garage. Permission had been granted and the package had been left (R. 207-210, 214). Accordingly, on the morning of January 27, 1956, Adams and Giordenello went to the home of Smith on Brownsville Street, Houston, Texas, where Giordenello said that he had heroin "stashed" (R. 137-138, 196). Smith was not at home, but Giordenello found the cache without Smith's help and took eight papers of heroin. Adams and Giordenello then drove to the prearranged meeting place (R. 137-138). Adams met Leonard (who was a police officer acting undercover), received payment, and delivered the heroin (R. 138, 140-141, 414-417, 769-772, 802; Govt. Ex. 4). Adams then picked up Giordenello and they shared the money received (R. 141).

At about 7:00 p.m. that evening, January 27, 1956, surveilling officers saw Giordenello drive away from his house. He was closely followed by defendant

Mitchell in another car (R. 231). Giordenello drove to the home of Leland Smith (R. 232) and went with Smith into a garage where he opened a package containing a white powder which Giordenello called heroin (R. 210-212). Smith walked out of the garage with Giordenello who carried with him a brown paper sack (R. 233-235). As they reached the fence surrounding Smith's issue, both were arrested by agents Finley and Shelton (R. 210-212, 226, 232-233, 235). Giordenello was carrying the package in his hand at the time of the arrest and it was taken from him then (R. 235). Upon examination and analysis, it turned out to contain something less than six ounces of heroin hydrochloride (R. 421-424, 804-805; Govt. Ex. 1, 17A-E).

The validity of the search of Giordenello's person is involved in No. 549, presently before the Court for argument, and No. 515 Misc., pending on petition for a writ of certiorari. The evidence seized was admitted against all the defendants and the validity of that search is therefore also an issue raised by this petition.

3. At about 11:00 p.m., January 27, 1956, Giordenello was taken to the local office of the Federal Bureau of Narcotics, where he asked for and received permission to call his wife Ardelle, who happened to be in Alto, Texas (R. 271, 331). Agent Finley heard Giordenello's portion of the conversation, during which Giordenello told his wife that he had been arrested and said, "Yes, they got it all" (R. 331).

On January 31, 1956, Ardelle Giordenello sent a telegram to "Benny, Dell's Cafe, 916 Eighth Avenue

between 54th and 55th, New York", asking him to call her immediately (R. 353; Govt. Ex. 11, limited to Ardelle and Indiviglio).

4. On May 12, 1956, narcotics agents Durkin and Zurbo visited Dell's Cafe, 916 Eighth Avenue, New York City, in an effort to locate a man known as "Benny" who owned the bar (R. 555-557). They saw Benny Indiviglio come into the cafe at about 11:00 p.m. He had the keys to the cash register in his possession and one of the bar maids referred to him as "the boss" (R. 557). A surveillance was undertaken (R. 586) and Indiviglio was seen in the vicinity of 728 Columbus Avenue (R. 560). At that time the agents had information that Giordenello's source of supply was a man in New York known as Benny, who had a bar, and that Benny's narcotics were hidden for him by a woman living "uptown" (R. 572). They also knew that Rose Diaz had received $2,500 in a money order (R. 607) (see p. 3 *supra*).

At about 4:00 a.m., May 22, 1956, agents Durkin and Dolce saw Indiviglio and two other men (one known to be trafficking in narcotics (R. 570)) drive away from Dell's Cafe in a black Lincoln automobile. The agents followed, accompanied by two New York City detectives (R. 558). Indiviglio got out of the Lincoln at 96th Street and Columbus Avenue and apparently saw the agents and Detective Roehling when they got out of their car to continue the surveillance, for he glanced over his shoulder, hastened his pace, and ducked into the doorway of 728 Columbus Avenue. At that point Roehling stopped petitioner Indiviglio, identified himself, and asked for identification. Indiviglio gave identificaton, said that

he lived on East 106th Street, and denied knowing anyone living at 728 Columbus Avenue (R. 559-560).

Three agents then went to the apartment of petitioner Diaz, which was in the building (under the name "Diviglio" (R. 732)), and knocked. A woman answered, saying "Who is it?" Agent Dolce replied, "Benny". The door was then opened by Rose Diaz. Detective Rochling told petitioner Diaz that his group was there on a narcotics investigation. Rochling amplified the statement of their purpose, saying that he had reason be believe narcotics were concealed on the premises. According to the agents, petitioner Diaz said "If you think there is narcotics here, you go ahead and look" (R. 560).

Petitioner Indiviglio was brought up to the apartment by another detective and searched (R. 560-561, 573). A card was found in his wallet which had Giordenello's name and Chicago address on it (R. 573, 578; Govt. Ex. 27).[2] The apartment was searched (R. 561) and the apartment lease, signed by Indiviglio and Diaz, was found (R. 631-632, 732-733; Govt. Ex. 33). The books for Dell's Cafe were also found (R. 747-750, 755; Govt. Ex. 40). A card was found which bore the notation "Linda Pitrinella", (Ardelle Giordenello's alias), "2901 Airline Drive, Houston, Texas" (R. 574, 579; Govt. Ex. 29-C). A white powdery substance was found hidden in the baseboard of the bedroom closet (R. 582-583). The substance was shown to Indiviglio and he spontaneously said, "You can't put that coke on me" (R. 583). On subsequent

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[2] The exhibit was admitted only against Indiviglio and Giordenello (R. 579).

analysis the substance turned out to be cocaine (R. 630, 646-647; Gov. Ex. 32).[3]

DISCUSSION

1. The trial commenced on October 2, 1956, with two days of hearings on motions to suppress by other defendants. On October 15, 1956, Mr. Campbell, counsel for petitioner Diaz, moved to suppress the cocaine found in the apartment at 728 Columbus Avenue, New York City (R. 1161-1162). That afternoon (R. 502), as the government was introducing the card found in petitioner Indiviglio's wallet at the time of his arrest (R. 578), and the card found in the apartment bearing the name "Linda Pitrinella" (R. 579), objection was made that the items were the result of an illegal search and seizure (R. 578, 579).

The following day, petitioner Diaz moved to suppress "a social security card bearing my name; a photostatic of a birth certificate bearing my name and various slips of paper with other names thereon" (R. 1164). In asking for permission to file this motion, counsel for Diaz said he did not want to delay the trial, but that he had had no reason to believe that any papers would be introduced in the case (R. 585). The trial judge agreed to discuss the motion with counsel at a later time (R. 585). After the government had rested, he ruled that Diaz's motions were legally insufficient for failure to allege ownership (R. 1038, 1043).

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[3] The lease and other exhibits found in the apartment were admitted only against Indiviglio and Diaz (R. 580, 631).

The first motion, to suppress the cocaine, alleged (R. 1161-1162):

> On or about May 22, 1956, I was lawfully in the premises of my apartment at 728 Columbus Avenue, New York City, New York, at which time several men entered my apartment. These men were Federal and State Agents to the best of my knowledge and belief. The said men forced me into my kitchen while one of the others searched my bedroom. At said time I was placed under arrest.
>
> All of this was done without a search warrant. My premises were searched without a warrant. The said officers, without a warrant, searched and removed the following articles. A quantity of narcotics approximately 29 grains of cocaine.
>
> * * *
>
> The said agents had no right to enter my premises and make a search and place me under arrest without a warrant.

The second motion, to suppress the documentary evidence, alleged (R. 1163-1164):

> On or about May 22, 1956, I was lawfully on my premises, at 728 Columbus Avenue, New York, New York. That several men came to my apartment on said date. * * * Thereafter these men entered my apartment and I was placed under arrest. Then one of these men went to my bedroom and thereupon seized some of my personal papers and belongings. I do not consider that I gave my consent to any of the foregoing.

The judge did not deny the motions as untimely, as he might well have been justified in doing under Rule 41, F. R. Crim. P. At the time he denied the

motion of Diaz, he conducted a hearing on a motion by defendant Mitchell, also filed after the trial had commenced (R. 1038, 1045-1061). For that reason, despite the delay, the validity of the ruling on the motions to suppress could properly be attacked on appeal. *United States* v. *Di Re*, 159 F. 2d 818 (C.A. 2), affirmed 332 U.S. 581.

We believe that the district judge was undoubtedly in error in ruling, as he did (R. 1038, 1043), that the motions of petitioner Diaz were legally insufficient for failure to allege ownership. While she did not allege ownership of the cocaine, she did clearly allege that it was her apartment that was illegally entered. One whose home has been unlawfully invaded has standing to move to suppress evidence taken by an unlawful invasion of his privacy. *Agnello* v. *United States*, 269 U.S. 20, 32-34. A hearing should therefore have been held to determine the motion on its merits.

For this reason, we believe that the conviction of petitioner Diaz and of petitioner Indiviglio, against whom the evidence secured by the search was also admitted (cf. *McDonald* v. *United States*, 335 U.S. 451, 456), must be reversed irrespective of the other issues in the case.

2. The evidence secured by the search of Giordenello's person was admitted against these petitioners as well. The validity of that search was brought into question when the evidence was first introduced at an earlier trial against Giordenello alone, and the matter is presently before this Court in *Giordenello* v. *United States*, No. 549. While, for the reasons stated

above, we believe that the conviction of these petitioners should be reversed, irrespective of the ruling in No. 549, we would agree that if the search was held invalid in that case, admission of the heroin into evidence at this trial might well furnish an independent ground for reversal against these petitioners as well as Giordenello. If the evidence should have been suppressed as to Giordenello, it would not have been available against these petitioners on a charge of conspiracy involving Giordenello. For that reason, the Court may wish to defer consideration of this petition, as well as that filed by Giordenello in relation to this trial (No. 515 Misc.), until decision on the merits in No. 549.

3. The other issues raised by petitioners, as to alleged trial errors in failing to turn over to the defense a statement by government witness Adams and in instructing the jury as to evidence admissible only against particular conspirators, need not be reached if there is to be a new trial. These issues are discussed in the Memorandum for the United States filed in response to the petition for a writ of certiorari in *Giordenello* v. *United States*, No. 515 Misc. We are lodging with the Clerk, ten additional copies of this Memorandum.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

April 1958

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